

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-120
Hawaii Administrative Rules
October 14, 1997

SUMMARY

1. §§3-120-2 to 3-120-4 are amended.
2. §3-120-6 is amended.
- 3 Chapter 3-120 Exhibit is amended.
4. Chapter 120 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 120

GENERAL PROVISIONS

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§3-120-1 Purpose. The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods and services, and the construction of public works for the State and counties, by:

- (1) Simplifying, clarifying, and modernizing the law governing procurement;
- (2) Requiring the continued development of procurement policies and practices;
- (3) Making the procurement laws of the State and counties as consistent as possible;
- (4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and counties;
- (5) Providing increased economy in procurement activities and maximizing to the fullest extent practicable the purchasing value of public funds;
- (6) Fostering effective broad-based competition within the free enterprise system;
- (7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and

- (8) Increasing public confidence in the procedures followed in public procurement.
[Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: SSLH 1993, Act 008, §1)

§3-120-2 Definitions. As used in subtitle 11:

"Administrator of the state procurement office", hereinafter referred to as "the administrator", means the administrator as provided in section 103D-204, HRS, or the administrator's duly appointed agent or representative.

"Bid" means the executed document submitted by a bidder in response to an invitation for bids, or a multi-step bidding procedure.

"Bidder" means any individual, partnership, firm, corporation, joint venture, or other entity submitting, directly or through a duly authorized representative or agent, a bid for the good, service, or construction contemplated.

"Change order" means a written order signed by the procurement officer, directing the contractor to make changes which the change clause of the contract authorizes the procurement officer to order without the consent of the contractor.

"Chief procurement officer" means the chief procurement officer for state entities and the several counties as provided in section 103D-203, HRS, or the officer's duly appointed agent or representative.

"Contract" means all types of agreements, regardless of what they may be called, for the procurement or disposal of goods or services, or for construction.

"Contract modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

"Contractor" means any individual, partnership, firm, corporation, joint venture, or other legal entity undertaking the execution of the work under the terms of the contract with the State, and acting directly or through its agents or employees.

"Cost analysis" means the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

"Cost data" means information concerning the

actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

"Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provision of this chapter, and a fee, if any.

"Data" means recorded information, regardless of form or characteristic.

"Days" means calendar days unless otherwise specified.

"Designee" means a person appointed by the head of a purchasing agency to act on its behalf with delegated authority.

"Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that is regularly maintained by a manufacturer or contractor; that is either published or otherwise available for inspection by customers; and that states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the goods or services involved.

"Established market price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and which may be an indication of the reasonableness of price.

"Head of the purchasing agency" means the head of any agency with delegated procurement authority.

"Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids under the competitive sealed bidding source selection method.

"Offer" means bid, proposal, or quotation.

"Offeror" means any individual, partnership, firm, corporation, joint venture, or other entity submitting, directly or through a duly authorized representative or agent, an offer for the good, service, or construction contemplated.

"Paying agent" means, as to bonds of any particular series, the director of finance or the bank or trust company designated for the payment of the principal and redemption price (if any) of, and interest on, the bonds or such series in the series resolution authorizing the issuance of such series or

the series certificate relating to such series.

"Price analysis" means the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

"Price data" means factual information concerning prices, including profit, for goods, services, or construction substantially similar to those being procured. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both the general contractor and subcontract prices.

"Procurement officer" means any person with delegated authority to enter into and administer contracts and make written determination with respect thereto. The term includes an authorized representative acting within the limits of authority. The delegated authority is received from the chief procurement officer directly or through the head of a purchasing agency or designee to the procurement officer.

"Proposal" means the executed document submitted by an offeror in response to a request for proposals.

"Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals under the competitive sealed proposal source selection method.

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

"Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or request for proposals.

"Solicitation" means an invitation for bids, a request for proposals, a request for quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a state contract.

"State" means the judiciary, the legislature, office of Hawaiian affairs, department of education, University of Hawaii, division of community hospitals within the department of health, remaining departments of the executive branch and all governmental bodies administratively attached to them, and the counties.

"Subcontractor" means any person who enters into an agreement with the contractor to perform a portion of the work for the contractor.

"Supplier" means prospective bidder or offeror.

"Support facility provider" means a bank, a national banking association, an organization subject to registration with the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956 or any successor provisions of law, a federal branch pursuant to the International Banking Act of 1978 or any successor provisions of law, a savings bank, a saving and loan association, an insurance company or association chartered or organized under the laws of any state of the United States of America, the Government National Mortgage Association or any successor thereto, the Federal National Mortgage Association or any successor thereto, or any other federal agency." [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-120-3 Applicability. (a) These rules shall apply to the procurement practices of all entities created by the State's and counties' constitutions, charters, statutes, ordinances, administrative rules, or executive orders, including the office of Hawaiian affairs, and the departments, commissions, councils, boards, bureaus, committees, institutions, authorities, legislative bodies, agencies, government corporations, or other establishment or office of the executive, legislative, or judicial branches of the State or its several counties.

(b) These rules shall apply only to contracts solicited or entered into after the effective date of chapter 103D, HRS, unless the parties agree to their application to a contract solicited or entered into prior to the effective date. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: SSLH 1993, Act 008, §1; HRS §§103D-102, 103D-111)

§3-120-4 Procurements exempt from chapter 103D, HRS. (a) Notwithstanding the intent of chapter 103D, HRS, to require governmental bodies to procure their goods and services through competitive bidding, it is acknowledged that there may be situations where procurement by competitive means is either not

practicable or not advantageous to the State.

(b) An exhibit titled "Procurements Exempt From Chapter 103D, HRS" dated 10/14/97 is located at the end of this chapter. This exhibit provides a list of goods and services which the procurement policy board has determined to be exempt from chapter 103D, HRS, because although such goods and services may be available from multiple sources, their procurement by competitive means would be either not practicable or not advantageous to the State.

(c) Chief procurement officers may request periodic reports from the heads of purchasing agencies of procurements made pursuant to section (b). The heads of purchasing agencies may be required to include in their reports, descriptions of the process or procedures the agency used to select the vendor ensuring maximum fair and open competition whenever practicable.

(d) Chief procurement officers may on an annual basis request that additional exemptions be added to the exhibit.

(e) The procurement policy board shall review the exhibit annually for amendments.

(f) Purchasing agencies making procurements which are exempt from chapter 103D, HRS, are nevertheless encouraged to adopt and use provisions of the chapter and its implementing rules as appropriate; provided that the use of one or more provisions shall not terminate the exemption and subject the procurement of the purchasing agency to any other provision of the chapter.

(g) Purchasing agencies shall cite on the purchase order or on the contract, the authority waiver as "Exempt From Chapter 103D, HRS, pursuant to section 3-120-4(b) (cite exemption number from exhibit), Hawaii Administrative Rules". [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §§103D-102, 103D-202) (Imp: HRS §103D-102)

§3-120-5 Procedures for requesting exemption.

(a) Prior to procurement, when the head of a purchasing agency determines that a situation exists wherein procurement by competitive means would be either not practicable or not advantageous to the State, a request to procure the good or service by exemption may be made to the appropriate chief procurement officer. The "Request for Exemption From

Chapter 103D, HRS" form provided by the administrator shall include the following information:

- (1) An explanation describing how procurement by competitive means is either not practicable or not advantageous to the State;
- (2) Details of the process or procedures to be followed in selecting the vendor to ensure maximum fair and open competition as practicable; and
- (3) A description of the agency's internal controls and approval requirements for the exempted procurement, and a list of agency personnel, by position title, who will be involved in the approval process and administration of the contract.

(b) In determining whether to approve the "Request for Exemption From Chapter 103D, HRS", the chief procurement officer shall consider the circumstances of each individual case.

(c) The chief procurement officer shall forward a copy of each approved and disapproved "Request for Exemption From Chapter 103D, HRS" to the administrator. [Eff 12/15/95; comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §103D-102)

§3-120-6 Record of procurement actions. The chief procurement officer shall maintain a record of all chapter 103D, HRS, exemptions pursuant to sections 3-120-4 and 3-120-5 for a minimum of five years. A report of the exemptions shall be submitted in accordance with section 3-122-211 to the legislature. The record shall be available for public inspection. [Eff 12/15/95; am and comp NOV 17 1997] (Auth: HRS §103D-202) (Imp: HRS §§103D-102, 103D-321)

Amendments to and compilation of chapter 120, title 3, Hawaii Administrative Rules, on the Summary Page dated October 14, 1997 were adopted on October 14, 1997 following a public hearing held on September 22, 1997 in Honolulu, Hawaii; and via video conference from Honolulu, Hawaii on September 23, 1997 to Hilo, Hawaii; Wailuku, Maui; and Lihue, Kauai; after public notice was given in the Honolulu Star-Bulletin, Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island on August 22, 1997.

They shall take effect ten days after filing with the Office of the Lieutenant Governor.

ROBERT E. OYAMA
Chairperson
Procurement Policy Board

SAM CALLEJO
State Comptroller

APPROVED:

BENJAMIN J. CAYETANO
Governor
State of Hawaii

Dated: _____

Filed

APPROVED AS TO FORM:

Deputy Attorney General

EXHIBIT

PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS
10/14/97

Exemption

Number Exemption

1. Services of expert witnesses for potential and actual litigation of legal matters involving the State, its agencies, and its officers and employees, including administrative quasi-judicial proceedings;
2. Works of art for museum or public display;
3. Research and reference materials including books, maps, periodicals, and pamphlets, which are published in print, video, audio, magnetic, or electronic form;
4. Meats and foodstuffs for the Kalaupapa settlement;
5. Opponents for athletic contests;
6. Performances, including entertainment, speeches, and cultural and artistic presentations;
7. Goods and services for commercial resale by the State;
8. Services of printers, rating agencies, support facility providers; fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;
9. Travel arrangements purchased by the University of Hawaii for its intercollegiate athletic programs;
10. Contracts for services of lecturers and public speakers;
11. Subgrants and subcontracts to organizations directed by the funding agency;

Exemption

Number Exemption

12. Materials, supplies, and foodstuffs purchased for use by students in vocational education programs when the type or amount required must be determined as part of the course curriculum;
13. Affiliation agreements with hospitals and other health care providers required for clinical education programs;
14. Services of legal counsel, guardian ad litem, psychiatrists, and psychologists, when required by court order, or by the Rules of Court in the case of interpreters, in criminal and civil proceedings;
15. Fresh meats and produce;
16. Educational material used in schools, libraries, and employee training, to include textbooks, workbooks, visuals, kits, guides, and tests, in print, video, audio, and magnetic or electronic form;
17. Insurance;
18. Animals and plants;
19. Used and surplus items which are advantageous, only available on short notice, and subject to sale, such as through an auction;
20. Food and fodder for animals;
21. Rental of hotel facilities for conferences, meetings, and training sessions;
22. Advertisements in specialized publications, such as in ethnic or foreign language publications, trade publications, professional publications;
23. Professional consultant services as required under Chapter 658, HRS;

Exemption

Number Exemption

24. Services for the publication of scholarly and educational books and journals which shall be limited to:
- a. Manuscript evaluation, copy editing, proofreading, indexing, design, manuscript clean-up, page make-up, and typesetting;
 - b. Design, production, and printing of promotional materials, and commission sales representation;
 - c. Warehouse storage and fulfillment services; and
 - d. Editorial and production services, including printing and binding, when full publication services are required for projects too difficult or too time consuming to produce in-house;
25. Interpreter services for deaf, hard-of-hearing or deaf-blind persons;
26. Publication of scholarly papers in specific professional journals;
27. Medical services for injured student athletes. These services include but are not limited to:
- a. Treatment by out-of-state medical health professionals when athletes are on the road for games;
 - b. Treatment for a difficult to diagnose and/or longstanding medical condition by a series of medical health professionals by referrals;
 - c. Treatment by a physician when athlete is referred by the team physician or by any one of the volunteer physicians;

Exemption

Number Exemption

- d. In-patient or out-patient surgical services performed by a physician assigned to a athlete by a hospital; and
 - e. Treatment by a family physician as requested by a student athlete; and
28. Medical services for research projects.